No. 96-461

In the Supreme Court of the United States

OCTOBER TERM, 1996

SHERRYL S. GOFFER, PETITIONER

v.

TOGO D. WEST, JR., SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the district court's February 23, 1993, Memorandum and Order constituted an effective judgment within the meaning of Fed. R. Civ. P. 58.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported. The decisions of the district court (Pet. App. 3a-11a) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1996. The petition for a writ of certiorari was filed on September 23, 1996 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1985 petitioner, a civilian employee of the United States Army, filed suit against the Secretary of the Army, alleging that she had been dismissed in retaliation for her equal employment opportunity

activities, in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e *et seq.* Petitioner also sought review of a decision of the Merit Systems Protection Board affirming her dismissal.

The district court denied petitioner's request for immediate reinstatement (Pet. App. 7a-11a), and the parties engaged in discovery. A bench trial was conducted in September and December 1987, and the parties submitted proposed findings of fact and conclusions of law in March 1988. According to petitioner (Pet. 3), the district court indicated at the close of trial that it intended to hear closing arguments before rendering a decision.

As of May 1990, petitioner still had not received notice of any action by the district court. Her counsel then filed a request for a status conference, which was held on July 18, 1990. According to the docket entries,[1] the parties at that time requested closing arguments and the district court indicated that arguments would be scheduled. However, the court neither set a date for arguments nor responded to petitioner's later request, made in April 1991, for a decision in her case.

On February 9, 1993, petitioner filed a petition for a writ of mandamus with the court of appeals, requesting that the district court be directed to render a decision. Pet. 4. On April 8, 1993, the court of appeals denied the petition; the court, however, encouraged the district court to "attend resolution of this case as promptly as feasible" and indicated that it would entertain a renewed petition should the district court fail to follow that directive. Pet. App. 12a.

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[1] Petitioner has lodged a copy of the docket with the Clerk of the Court. Pet. 7 n.6.

2. While petitioner's mandamus petition was pending, the district court entered a "Memorandum and Order" in the case. Pet. App. 5a-6a. The court found in favor of the defendants on both claims, directed that "judgment [be] entered in favor of [the] defendant," and dismissed the complaint with prejudice. *Id.* at 6a. The opinion was filed and entered on the docket on February 23, 1993, and a copy was received by the U.S. Attorney's Office within a week of its entry on the docket. Pet. 7 n.6. Petitioner claims, however, that a copy of the decision was neither sent to, nor received by, her counsel.[2]

On June 5, 1995, petitioner's counsel obtained a copy of the docket in connection with preparing a second mandamus petition for the court of appeals. Upon learning of the February 23d Memorandum and Order, petitioner's counsel filed with the district court a motion for entry of judgment under Fed. R. Civ. P. 58. Pet. 8.

The district court denied the motion, holding that its February 23, 1993, decision complied with Rule 58 and had been properly entered on the docket, that notice of the entry had been sent to counsel, and that under Fed. R. Civ. P. 77(d) whether or not petitioner's counsel received the notice was irrelevant. Pet. App. 3a-4a.

3. The court of appeals summarily affirmed. Pet. App. 1a-2a. The court was "troubled" by the petitioner's "failure to learn of the entry of the order (through an examination of the district court docket)

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[2] Apparently, the court of appeals did not receive notice or a copy of the district court's decision, since its April 8 opinion makes no mention of it and is premised upon a conclusion that no decision had yet been rendered by the district court.

until June 1995." The court concluded that the district court's February 23, 1993, order "complied with the requirements of Fed. R. Civ. P. 58 and 79(a)." Pet. App. 1a.

ARGUMENT

We agree with petitioner that the decision below is in error and that relief in these circumstances is warranted.

1. At various points, petitioner complains of the fact that her counsel did not receive notice of the district court's February 23, 1993, decision. Pet. 5-8, 17-19 & n.9. Whether or not notice was received, however, is irrelevant. As petitioner eventually concedes (Pet. 17), Fed. R. Civ. P. 77(d) specifically states that the "[l]ack of notice of entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed." Thus, the alleged lack of notice of the district court's decision cannot form a basis for relief in this matter.

2. We concede, however, that petitioner should be granted relief on another ground. Rule 58 of the Federal Rules of Civil Procedure requires that a judgment[3] be "set forth on a separate document," and it specifically states that a "judgment is effective *only* when so set forth" (emphasis added). The rule further provides that judgments must be entered in accordance with Fed. R. Civ. P. 79(a), which requires that all papers filed in an action be entered on the docket. The Court has held that these requirements "must be mechanically applied" to avoid "uncer-

[3] The term "judgment" as defined in Rule 54(a), "includes a decree and any order from which an appeal lies." Fed. R. Civ. P. 54(a).

taint[y] as to the date on which a judgment is entered." *United States* v. *Indrelunas*, 411 U.S. 216, 222 (1973). While the Court has also held that parties, through their actions, may waive these procedural mandates, *Bankers Trust Co.* v. *Mallis*, 435 U.S. 381 (1978), the Court has emphasized that these requirements "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Id.* at 386 (quoting 9 J. Moore, *Moore's Federal Practice* ¶ 110.08[2], at 119-120 (1970)). Thus, because preservation of the right to appeal lies at the heart of the rule's mandate, the rule's requirements must be viewed as mandatory when a party would be unfairly prejudiced by anything short of strict compliance. Accord *Clough* v. *Rush*, 959 F.2d 182, 185 (10th Cir. 1992).

a. We do not believe that the February 23, 1993, decision satisfies the "separate document" requirement of Rule 58. As this Court explained in *Bankers Trust Co.*, 435 U.S. at 385, the purpose of this requirement was to eliminate any possible uncertainty that might arise when opinions or memoranda containing some of the elements of a judgment—but not formally labelled as such—were entered on the docket. Accordingly, "[t]he amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memorandum—which provides the basis for entry of judgment." *Ibid.* (quoting 28 U.S.C. App., at 7824).

As there is no "distinct" district court judgment in this matter that is separate from the court's memorandum, we agree that the court did not comply with the separate judgment requirement of Rule 58. Indeed, as petitioner notes (Pet. 15), numerous

appellate courts have held that documents containing the type of discussion included in the district court's decision in this case do not satisfy the separate judgment rule. See *Cooper* v. *Town of East Hampton*, 83 F.3d 31 (2d Cir. 1996); *Barber* v. *Whirlpool Corp.*, 34 F.3d 1268 (4th Cir. 1994); *Axel Johnson, Inc.* v. *Arthur Andersen & Co.*, 6 F.3d 78 (2d Cir. 1993); *Clough* v. *Rush*, 959 F.2d 182 (10th Cir. 1992); *Allah* v. *Superior Court*, 871 F.2d 887 (9th Cir. 1989); *Vernon* v. *Heckler*, 811 F.2d 1274 (9th Cir. 1987); *Kanematsu-Gosho, Ltd.* v. *M/T Messiniaki Aigli*, 805 F.2d 47 (2d Cir. 1986); *Paddock* v. *Morris*, 783 F.2d 844 (9th Cir. 1986); *Gregson & Assoc.* v. *Government of the Virgin Islands*, 675 F.2d 589 (3d Cir. 1982).

b. Further, the prejudice that has resulted from the failure to comply with Rule 58's requirements suggests that "mechanical application" of the rule is warranted in this case; the case relied on by the court of appeals is thus distinguishable. In *Spann* v. *Colonial Village, Inc.*, 899 F.2d 24 (D.C. Cir. 1990), plaintiffs' previous attempt to appeal had been rebuffed because the district court had failed to rule on all claims. The district court then endeavored to resolve the matter by ruling on the remaining claims, stating that its order "makes judgment in these cases final." *Id.* at 31. The court did not enter a separate judgment in accordance with Rule 58. Rejecting an argument that the appeal was premature, then-Judge Ginsburg stated for the court that "Rule 58 * * * 'must be applied in such a way as to favor the right to appeal,'" and that it "should not be used to require the pointless formality of returning to the district court for ministerial entry of judgment." 899 F.2d at 32 (quoting *Bankers Trust* v. *Mallis*, 435 U.S. at 384).

Clearly, the holding in *Spann*, like *Bankers Trust*, construed Rule 58 "to favor the right to appeal" and avoided the "pointless formality" of requiring an appellant to return to the district court for entry of a separate judgment meeting the requirements of Rule 58. 899 F.2d at 32 (quoting *In re Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir. 1988)). That is entirely distinguishable from the present case, where the lower courts' construction of the February 23, 1993, "Memorandum and Order" resulted in the loss of petitioner's right to appeal.

3. This Court, of course, does not "mechanically accept any suggestion from the Solicitor General that a decision rendered in favor of the Government by a United States Court of Appeals was in error." *Lawrence* v. *Chater*, 116 S. Ct. 604, 606-608 (1996) (quoting *Mariscal* v. *United States*, 449 U.S. 405, 406 (1981)). However, in light of the change in position taken by the government, and the substantial authority supporting petitioner's contention (with which we now agree) that the court below erred in precluding her appeal, we respectfully suggest that the Court grant the petition, vacate the decision below, and remand the case to the court of appeals for further consideration. See generally, *e.g.*, *Lawrence* v. *Chater*, 116 S. Ct. at 606, 608; *Stutson* v. *United States*, 116 S. Ct. 600, 602 (1996).

CONCLUSION

The petition for a writ of certiorari should be granted, the order of the court of appeals granting summary affirmance and denying summary reversal should be vacated, and the case should be remanded for further consideration in light of the views expressed herein.

Respectfully submitted.

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NOVEMBER 1996

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* Acting Solicitor General Dellinger has recused himself from participation in this case.